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IN THE COURT OF APPEALS OF INDIANA

TROY NOE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0509-CR-886
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 2
The Honorable Robert Altice, Judge
Cause No. 49G02-0403-FC-38044

September 27, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Appellant, Troy Noe, appeals following his conviction for Battery Causing Serious Bodily Injury as a Class C felony,[1] for which he received the four-year presumptive[2] sentence, with two years to be served on work release and two years to be suspended to probation. Upon appeal, Noe challenges the trial court's finding and weighing of aggravators and mitigators and its imposition of the presumptive sentence.

We affirm.

According to the charging information, which was filed March 5, 2004, Noe was involved in an incident on December 21, 2003, in which he struck Chris Linville in the eye, resulting in serious bodily injury to Linville, including orbital fracture, facial nerve damage, and/or glaucoma. On July 12, 2005, Noe was convicted by a jury of battery causing serious bodily injury as a Class C felony. Following an August 24, 2005 sentencing hearing, the trial court sentenced Noe to the presumptive sentence of four years, with two years to be served on work release and two years to be suspended to probation. Noe filed his notice of appeal on September 21, 2005.

Noe contends upon appeal that the trial court's imposition of the presumptive sentence in spite of its finding mitigating circumstances and no aggravating circumstances was inappropriate and that the court erred in failing to give reasons for imposing the presumptive sentence. The State responds by citing to the amended version

[1] Ind. Code § 35-42-2-1 (Burns Code Ed. Repl. 2004).

[2] The amended version of Indiana Code § 35-50-2-6 (Burns Code Ed. Supp. 2006) references the "advisory" sentence, reflecting the April 25, 2005 changes made to the Indiana sentencing statutes in response to Blakely v. Washington, 542 U.S. 296 (2004), reh'g denied. Because Noe committed the crime in question before the effective date of the amendments, we apply the version of the statute then in effect and refer instead to the presumptive sentence. See Ind. Code § 35-50-2-6 (Burns Code Ed. Repl. 2004).

of I.C. § 35-50-2-6 (Burns Code Ed. Supp. 2006) and arguing that the trial court was not obligated to explain its reasons for sentencing Noe, so long as the sentence fell within the "advisory" sentence range.

We note that Noe committed the crime at issue on December 21, 2003. In Weaver v. State, this court determined that the application of the April 25, 2005 sentencing statutory amendments to defendants convicted before the effective date of the amendments, but sentenced afterward, violates the prohibition against ex post facto laws. 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), trans. denied. Given the general rule that the statute to be applied when fixing punishment is the one in effect at the time the crime was committed, we presume that the application of the new sentencing statutes to defendants whose crimes were committed before those statutes were passed, even if they were convicted and sentenced afterward, similarly violates the prohibition against ex post facto laws. See Ford v. State, 755 N.E.2d 1138, 1143 (Ind. Ct. App. 2001), trans. denied. We therefore apply the sentencing statute in effect on December 21, 2003, prior to the amendments.

Regarding Noe's challenge to his sentence, we are reminded that sentencing determinations, including whether to adjust the presumptive sentence, are within the discretion of the trial court. Ruiz v. State, 818 N.E.2d 927, 928 (Ind. 2004). If a trial court relies upon aggravating or mitigating circumstances to modify the presumptive sentence, it must do the following: (1) identify all significant aggravating and mitigating circumstances; (2) explain why each circumstance is aggravating or mitigating; and (3) articulate the evaluation and balancing of the circumstances. Id.

When a trial court finds aggravating or mitigating circumstances, it must make a statement of its reasons for selecting the sentence imposed. Frey v. State, 841 N.E.2d 231, 234 (Ind. Ct. App. 2006). The trial court need not set forth its reasons, however, when imposing the presumptive sentence. Id. Therefore, if the trial court does not find any aggravators or mitigators and imposes the presumptive sentence, the trial court does not need to set forth its reasons for imposing the presumptive sentence. Id. Yet, if the trial court finds aggravators and mitigators, concludes they balance, and imposes the presumptive sentence, then, pursuant to Indiana Code § 35-38-1-3 (Burns Code Ed. Repl. 2004), the trial court must provide a statement of its reasons for imposing the presumptive sentence. Id.

In its sentencing order the court gave the following justifications for imposing the presumptive four-year sentence and suspending two years:

> "In sentencing the defendant, the Court is going to find as a mitigating circumstance that imprisonment would impose a hardship on his dependents. And the Court is also going to find as a mitigating circumstance that he does have minimal criminal history. However, I'm not going to give that great weight because there is that one robbery conviction that he does have in his past. The Court's also going to find as mitigating his prior military service as well. And this is a tough case. It's . . . on the one hand I've got a gentleman who, for all intents and purposes and for a lack of a better term, was sucker-punched. I think is what the jury kind of felt like had occurred here. But the injuries are absolutely devastating. And we sat and listened to two days of primarily medical testimony on the problems that this individual's going to have to face for the rest of his life. And then, on the other hand, I've got a guy who's led a fairly law abiding life, most of his life. He's got an excellent business. He's got three fairly young children. So it's—it's very tough. Easily I could even—I mean, I could easily give him four years in the Department of Correction and I'm convinced that that would be okay on appeal. I don't think I'd get reversed for that. So anyway, what I've decided and as you may not know, [defense counsel], but I spend a lot of time getting my

> sentences ready. I don't just talk out here and sentence on a cuff. And I've given this one more thought than I would normally give any of them and that's a lot. So anyway, I'm going to sentence the defendant to four (4) years. The first two (2) years will be on work release. And the other two years are going to be suspended. And then he'll be placed on probation for two (2) years." Tr. at 42-43.

In challenging his sentence, Noe argues that the trial court erred by imposing the presumptive sentence without explanation in spite of its clear finding of three mitigators and its failure to identify aggravators.

The trial court imposed the presumptive four-year sentence in this case, suspending two years. In imposing such sentence, the trial court was not required to offer any reasoning to justify it. See Frey, 841 N.E.2d at 234. In this case, however, the court did not merely articulate its imposition of the presumptive sentence. Instead, and to its credit, the court offered justification for its sentence. Given this justification, we are required to determine whether the trial court properly identified and weighed aggravators and mitigators in arriving at this sentence. See id.

As Noe argues, the trial court identified the following three mitigators in imposing his sentence: (1) undue hardship on dependents; (2) minimal criminal history, to which the court attributed minimal weight; and (3) prior military service. All three of these mitigators were well-supported by the record. Testimony during sentencing, as well as the pre-sentence investigation report, indicated that Noe and his wife ran a business by which they supported their three children; Noe had had only one prior conviction, for robbery, which occurred almost twenty years prior to the instant offense, and which Noe contended was reduced to a misdemeanor; and Noe served with distinction in the

military. The trial court did not identify any aggravators, although it appears that the court offset the weight of the above mitigators by its consideration of the fact of the "sucker-punch" and the "devastating" and lifelong injuries to the victim. Tr. at 42.

As a preliminary matter, we recognize that the court suspended two years of Noe's sentence. We do not believe, however, that we may consider such suspension in determining whether the trial court properly considered the mitigators. To be sure, a suspended sentence is less onerous in its penal impact upon a defendant than a fully executed sentence, but it is not a lesser sentence in terms of years. As we indicated in Cox v. State, 792 N.E.2d 878, 883 n.5 (Ind. Ct. App. 2003) and Cox v. State, 792 N.E.2d 898, 904 n.6 (Ind. Ct. App. 2003), trans. denied, our review of Noe's sentence is not altered by the fact that two years of his sentence were suspended. After all, "'a year is still a year, and a sentence is still a sentence.'" Cox, 792 N.E.2d at 884-85 (Sullivan, J., concurring) (quoting Beck v. State, 790 N.E.2d 520, 523 (Ind. Ct. App. 2003) (May, J., concurring)); Cox, 792 N.E.2d at 906 (Sullivan, J., concurring) (quoting Beck, 790 N.E.2d at 523 (May, J. concurring)); see Eaton v. State, 825 N.E.2d 1287, 1290-91 (Ind. Ct. App. 2005), disapproved of on other grounds by Childress v. State, 848 N.E.2d 1073, 1079-80 (Ind. 2006). But see Beck, 790 N.E.2d at 522 (holding by majority that the defendant's suspended sentence was within the court's discretion because "while sentenced to the maximum sentence of 365 days, [the defendant] did not receive the maximum punishment of an executed sentence.")

In evaluating Noe's sentence, we note that a trial court may consider the nature and circumstances of the crime as an aggravator. See Henderson v. State, 769 N.E.2d

172, 180 (Ind. 2002). Further, although a trial court may not use a factor constituting a material element of an offense as an aggravating circumstance, it may look to the particularized circumstances of a criminal act and determine that the particular manner in which a crime is committed carries aggravating weight. See id.

Here, it appears that the trial court, while it did not specifically categorize the fact of the "sucker-punch" and the "devastating" effect of the injuries, nevertheless assigned them weight which served to counterbalance the weight of the mitigating factors. The trial court was entitled to consider such factors in its weighing process. As noted above, the court is free to consider the manner in which the crime was committed when evaluating and determining a sentence suited to the crime. Here, the fact of the "sucker-punch" weighed against Noe and served to offset the effect of the mitigators. Further, the court in this case specifically found the injuries were "absolutely devastating." Transcript at 42. While the injuries, which the court did not enumerate as a separate aggravator, qualified as "serious bodily injury," the court apparently viewed them as a particularly egregious form of serious bodily injury, justifying its use of them to counterbalance the effect of the three mitigators in imposing the presumptive sentence. The court was within its discretion to consider the manner in which the crime was committed and the perceived egregious nature of the resulting injuries for purposes of evaluating Noe's crime and imposing the presumptive sentence.

Having determined that the trial court, which explained its weighing process, properly justified its imposition of the presumptive sentence, we affirm Noe's presumptive four-year sentence.

The judgment of the trial court is affirmed.

BAKER, J., and MAY, J., concur.